**JAMAICA**

**IN THE COURT OF APPEAL**

**SUPREME COURT CIVIL APPEAL NO 16/2015**

**APPLICATION NO 172/2016**

**BEFORE: THE HON MR JUSTICE MORRISON P**
**THE HON MISS JUSTICE PHILLIPS JA**
**THE HON MRS JUSTICE SINCLAIR-HAYNES JA**

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| **BETWEEN** | **DIGIORDER JAMAICA LIMITED** | **APPLICANT** |
| **AND** | **DENNIS ATKINSON** | **RESPONDENT** |

**Written submissions filed by Golaub & Golaub on behalf of the applicant**

**Written submissions filed by Joseph Jarrett & Co on behalf of the respondent**

**20 and 27 January 2017**

**(Considered by the court on paper pursuant to rule 1.7(2)(j) of the Court of Appeal Rules 2002)**

**MORRISON P**

[1] I have read the draft reasons for judgment of my sister Phillips JA. I agree with her reasoning and have nothing useful to add.

**PHILLIPS JA**

**Background**

[2] An application for clarification of a judgment delivered by this court on 3 July 2015, was filed by Digiorder Jamaica Limited (Digiorder) on 15 September 2016. It sought to clarify the order given by this court in relation to costs. That order made no

mention of costs in respect of the judgment given in the Supreme Court which was the subject of the appeal to this court in SCCA No 16/2015. This application was considered on paper and on 20 January 2017, we made the following order:

> "The order of the Court of Appeal made on 3 July 2015 on procedural civil appeal no 16/2015 is hereby clarified by correction to read as follows:
>
> > 'Appeal allowed. Costs to the appellant both here and in the court below to be agreed or taxed'."

We promised to deliver our reasons in writing and the following reasons are in fulfilment of that promise.

It may assist in understanding how this application came before the court to set out a brief summary of the facts of the case.

**Brief facts**

[3] By an agreement dated 30 March 1998, Mr Dennis Atkinson obtained a loan from the Development Bank of Jamaica Limited (DBJ) in the sum of US$308,106.00 to expand and upgrade Ocean Sands Resorts Limited in the parish of Saint Ann (the property), that he owned and in which he was a 2nd mortgagee. The loan fell into arrears and with the approval of DBJ, Dennis Atkinson sold his interest in the property to Cash Plus Development Limited (Cash Plus) for US$1,000,000.00 by way of cash and a vendor's mortgage of US$668,116.28. Cash Plus assumed liability for payment of the loan from DBJ to Dennis Atkinson but it defaulted on payments and later became bankrupt. To realize its mortgage security, DBJ decided to sell the property pursuant to

its instrument of mortgage. In pursuit of this endeavour DBJ engaged the services of Kenneth Tomlinson, managing consultant and managing director of Business Recovery Services Limited. DBJ accepted an offer of sale for the property from Digiorder in the sum of J$50,000,000.00.

[4] Dennis Atkinson was aggrieved by what he deemed was a low sale price for the property, which he alleged based on valuations of the property that had been conducted, had a market value of J$149,000,000.00 at the lowest and J$207,088,000.00 at the highest. He therefore filed a claim in the Supreme Court against DBJ, Business Recovery Services Limited, Kenneth Tomlinson and Digiorder which was amended on 7 February 2014, in which he sought various declarations that, *inter alia*, the property ought not be sold at a price that was less than market value and that the proposed sale of the property to Digiorder was fraudulent; or in the alternative for damages; and interest on the market value of the property at the commercial rate of 30%.

[5] In a notice of application for court orders filed 2 July 2014, Digiorder sought an order that it be removed from the claim pursuant to rule 19.2(4) of the Civil Procedure Rules, 2002 (CPR). K Anderson J heard this application on 2 February 2015 and on 3 February 2015, he refused it, awarded costs to Dennis Atkinson to be taxed if not agreed and granted Digiorder leave to appeal. Digiorder thereafter filed an appeal on 11 February 2015, challenging K Anderson J's decision. This appeal was considered by this court on paper pursuant to rule 2.4 of the Court of Appeal Rules 2002 (CAR) and the appeal was allowed with costs awarded to Digiorder to be agreed or taxed.

[6] The order made by this court on 3 July 2015, as indicated made no mention of costs in the Supreme Court, and so on 15 September 2016, Digiorder filed a notice of application for correction of judgment, seeking a correction of the order made by this court in relation to the award of costs in the Supreme Court. This matter was to be heard by the court on 19 December 2016, however, Dennis Atkinson's attorney did not attend. An order was made then that the application would be considered on paper pursuant to rule 1.7(2)(j) of CAR and that the parties were to file and serve skeleton arguments and supporting authorities.

**Submissions**

[7] Counsel for Digiorder cited **Consetta Edwards and others v Joan May Black Valentine and others** [2012] JMCA Civ 61 to show that this court has held that an order for costs is discretionary. Counsel relied on rules 2.15(b) and (f) of CAR which authorizes this court to make orders for costs in this court and in the court below. Counsel also cited **American Jewellery Company Limited and others v Commercial Corporation Jamaica Limited and others** [2014] JMCA App 16 which held that where there is an error, mistake, slip or omission this court may make an amendment to an order previously made. Counsel submitted that rule 64.6(1) of the CPR enshrines the long established principle that costs should follow the event, and since the Digiorder was successful in its appeal, it would be entitled to costs both here and below. So, although the court allowed the appeal and granted costs on the appeal, counsel submitted that the application for correction of judgment should be allowed as the court ought to have given consideration and noted its decision in relation to the

grant of the costs below but counsel argued that the court had inadvertently omitted to do so.

[8] In the written submissions of counsel for Dennis Atkinson, he stated that it was inconceivable that three distinguished judges of this honourable court could have made such a mistake. Moreover upon his reading of the judgment handed down on 3 July 2015, this court, according to counsel, canvassed all the relevant issues and made the appropriate costs order. Counsel contended that even if the order in relation to costs was a mistake, the application was being made a year and a half after the order on appeal had initially been delivered, which represented a delay of 16 months which was inordinate. Counsel asked this court to consider the fact that the claim against Digiorder had been discontinued after K Anderson J's ruling and before the order made by this court on 3 July 2015, which saved time and costs in the court below. Counsel stated that the authorities relied on by Digiorder's counsel were distinguishable from the instant case and were all inapplicable. In all the circumstances outlined, he invited the court to refuse the application sought.

**Discussion and analysis**

[9] In the judgment of this court we analysed whether the learned judge had erred in refusing to accede to the request for Digiorder to be removed from the suit. There were essentially four declarations prayed for in respect of Digiorder, namely numbers (3), (4), (6) and (7) in relation to whether the subject property was being sold to Digiorder at a value below the market value; which value was fraudulent, and as a consequence that the sale to Digiorder should be set aside. This court found that the

allegations made and therefore the evidence which would have to be adduced at the trial in the court below related to actions of DBJ, Business Recovery Services Limited and Kenneth Tomlinson and not to Digiorder. There were no particulars of fraud or wrong doing alleged against Digiorder. The fact that Digiorder had made an offer to purchase the property could not justify an order compelling it to remain as a party to the proceedings. Additionally, there had been no sale of the property to Digiorder and therefore no order could be made to set it aside. This court also found that the remaining declarations set out in the claim form related to the other parties in the action. In keeping therefore with the overriding objective to deal with cases justly and to save expense, this court had ruled that it was unnecessary and only increased costs for Digiorder to remain in the suit. The appeal was allowed and the judge's order below was set aside.

[10] By this analysis and order it meant that K Anderson J had erred in failing to accept that Digiorder was not a necessary party to the proceedings and that it had no legal or equitable interest in the claim. it was the opinion of the court that the learned judge ought to have exercised his discretion pursuant to rule 19.2(4) of the CPR and removed Digiorder as a party as it was desirable to do so.

[11] Rule 64.6(1) of the CPR reads as follows:

> "If the court decides to make an order about the costs of any proceedings, the general rule is that it must order the unsuccessful party to pay the costs of the successful party..."

[12] In the court below, as stated, K Anderson J refused the application to remove Digiorder as a necessary party in the action. He ordered costs against Digiorder, the losing party, to be paid to the successful party Dennis Atkinson. On appeal, the court having found that the learned judge had erred in the exercise of his discretion, that order was set aside which included the order for costs to Dennis Atkinson against Digiorder. However, in the appeal, Digiorder sought the following orders that:

> "Judgment is entered for [Digiorder] on the claim for costs to be taxed if not agreed.
>
> Costs of the appeal and of the proceedings in the court below to be awarded to [Digiorder], to be taxed if not agreed."

In the Court of Appeal, the court ordered:

> "...costs to the appellant to be agreed or taxed."

The order was silent in respect of the costs in the court below. But in my view, had Digiorder brought to the attention of the court when this appeal was being considered on paper that the court had made no mention of the order of costs in the court below, I would have promptly made that order. I consider it an error by way of omission in the court's order and would state that it is within the jurisdiction of this court to correct it.

[13] This court has previously given decisions on how the court should proceed in such circumstances. In **American Jewellery Company Limited and others v Commercial Corporation Jamaica Limited**, Morrison JA (as he then was) on behalf of the court at paragraph [2] said:

> "Rule 42.10(1) of the Civil Procedure Rules 2002 ('the CPR') provides that '[t]he court may at any time (without an appeal) correct a clerical mistake in a judgment or order, or an error arising in a judgment or order from any accidental slip or omission'. This is the well-known 'slip rule', which has been a feature of the rules of civil procedure for many years. While this is not one of the rules of the CPR which has been explicitly incorporated into the rules of this court by rule 1.1(10) of the Court of Appeal Rules 2002, it is common ground between the parties that this court may, by virtue of its inherent jurisdiction to control its process, 'correct a clerical error, or an error arising from an accidental slip or omission…in its judgment or order' (per Harris JA, in **Brown v Chambers** [2011] JMCA Civ 16, para. [11])."

[14] In **Dalfel Weir v Beverly Tree** [2016] JMCA App 6, Morrison P on behalf of this court also made the following statement at paragraph [17]:

> "...This court has the power to correct errors in an order previously made by it arising from accidental slips or omissions, so as to bring the order as drawn into conformity with that which the court meant to pronounce. In considering whether to exercise this power, the court will be guided by what appears to be the intention of the court which made the original order..."

In **Weir v Tree**, I recognised that the issues were, as they are in the instant case, was there an error or omission in the order of the court; does the court have the power to correct it; and in the particular circumstances of the case, ought the court to do so? In paragraph [58], I referred to the case of **Hatton v Harris** [1892] AC 547, in particular the dictum of Lord Herschell, when he said this:

> "...[A]ny clerical mistake in a decree, or any error arising from any accidental slip or omission, may at any time be corrected on motion or petition."

[15] In my view, the court is empowered to correct an error by virtue of its inherent jurisdiction in order to ensure that the court's intention was manifest and operative. As I stated at paragraph [65] in **Weir v Tree**, this court has the jurisdiction to correct an order made by the court that does not express the intention of the court, but it cannot rehear or alter the order made.

[16] In the instant case, as I indicated above, generally, the unsuccessful party ought to pay the costs of the successful party. In this case, Digiorder has succeeded both here and in the court below. It is clear, as stated, that there was no basis for Digiorder to have been a necessary party to the action, as they had no legal or equitable interest in the action and as such they had to be removed therefrom. In the appeal, Digiorder had sought that both costs in the appeal and in the court below be awarded to them; and in my view it was clearly an omission of the court not to order costs in respect of the judgment which had been set aside in the court below, as it would have properly reflected the intention and the reasoning of the order of the court. The fact that the application was not made promptly would not affect the correction of the judgment to include the order for costs in the court below as there was no indication before the court that any party would have been prejudiced by that order. (See Lord Herschell in **Hatton v Harris** at pages 558 and 560.) As a consequence it was incumbent on us to exercise our inherent jurisdiction and correct the omission in respect of costs in the court below and so we granted the application sought and made the orders stated in paragraph [2] herein.

**SINCLAIR-HAYNES JA**

[17] I too have read in draft the reasons for judgment of my sister Phillips JA and agree with her reasoning. I have nothing to add.